IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 218.

Office Supreme Court
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JAMES H. McKEN

IROQUOIS TRANSPORTATION COMPANY,
Claimant of the Steamer Winnebago, Etc.,
Plaintiff in Error,

vs.

DE LANEY FORGE & IRON COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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ADDITIONAL STATEMENT OF FACTS.

A fact which appears inferentially, though not directly, in statement of facts in brief for plaintiff in error, should perhaps affirmatively appear, to wit: that the claims for which liens have been enforced are for materials furnished in connection with the *original construction*—the *building* of the ship *Winnebago.*

A statement which might be misunderstood, if not here referred to, is the statement in plaintiff in error's statement of facts (p. 2), that the steamer was "completed for delivery" July 19th, 1903. As a matter of fact, the steamer was delivered on that date, but she was delivered in an uncompleted condition, and was so turned over to the Iroquois Transportation Company, for whom she was

being built, in such uncompleted condition, only eleven days before the builder, the Columbia Iron Works, made a common law assignment for the benefit of its creditors.

A further fact should perhaps appear that the *Winnebago* was never seized or attached in these proceedings, but that instead a bond was given without seizure.

A further fact may also be stated that subsequent to the decree of the Supreme Court of Michigan application for a writ of error was made to the Supreme Court of Michigan, and refused, and that it was thereafter that an application was made to this court by plaintiff in error.

The several propositions contended for in the brief for plaintiff in error will be answered in the order in which they are treated in that brief.

Of Point I.

The first point deals with the question of whether or not the *Winnebago* was at the time of her construction used or intended to be used in navigating the waters of the State of Michigan within the meaning of the Watercraft Act, which provides (Section 10789 of the Compiled Laws of Michigan, 1897, Section 2), as follows:

> "Every water craft of above five tons burthen, used, or intended to be used, in navigating the waters of this state, shall be subject to a lien, etc."

The question is, whether or not the Legislature of Michigan intended by the act to confine it to vessels navigating exclusively within the waters of such state.

The Supreme Court of Michigan has determined what the intention of the Legislature of the State of Michigan was in this regard, as appears in the case of the *Brig "City of Erie" vs. Canfield*, et al., 27 Michigan, 479.

In the case at bar the Supreme Court of the State of Michigan has also passed upon this particular question (R., 144).

It is in no sense a Federal question, and is therefore not before this court.

Ashley vs. Ryan, 153 *U. S.*, 436.

It would therefore not seem profitable in this connection to consider the California and Oregon cases in the brief for plaintiff in error, which authorities are of course dealing only with their local statutes. These cases were fully discussed in the case at bar in the brief filed with the Supreme Court of the State of Michigan.

As was stated by Circuit Judge Severens in the Circuit Court of Appeals for the Sixth Circuit, in a case dealing with this same vessel and this same general state of facts, reported in 141 Federal, 945, at page 949; 73 C. C. A., 295, at page 299:

> "The construction of the provision of the statute in this regard was presented to the Supreme Court of the state in The City of Erie vs. Canfield, 27 Mich., 479, and was decided adversely to the contention which counsel for plaintiff in error now makes; the court holding that the vessel need not be one intended to be exclusively used on the waters of that state. Apparently this settles the question for us, if, as we think, it could make no difference in determining the maritime nature of the transaction, whether the ship was intended to be used wholly in Michigan waters, or elsewhere as well."

Of Point II.

The plaintiff in error next sets up the point that the complainant cannot recover in this case, because at the time it received notice of the complainant's claim, and at the time of the seizure of the steamer *Winnebago* in this suit, it was a bona fide purchaser without notice of complainant's lien, and that complainant did not within a

year file in the proper court in the county in which it resides, its claim for a lien.

As preliminary the *Winnebago* was never seized in these proceedings.

While the point here raised by plaintiff in error is not before this court, Ashley vs. Ryan, 153 U. S., 436, Dower vs. Richards, 151 U. S., 658, the elaborate discussion of facts under this point in the brief for plaintiff in error affecting as it may other issues, is our excuse for a full answer.

No such defense was set up in the pleadings in the cause, and it was not until after appeal had been taken to the Supreme Court of the state of Michigan that a motion was made "to amend answer, etc." This motion to amend was submitted, briefs filed, and the motion denied by the Supreme Court of the State of Michigan on October 8th, 1904. It was submitted to the Supreme Court of the State of Michigan that if there were any merit in the defense which plaintiff in error then proposed to have added to the answers, the consideration of it would allow plaintiff in error to profit by its wrongful delay. In other words, if the additional defense then offered had been timely set up, defendant in error would have had ample opportunity to overcome it had it desired to do so. It was not until after the year prescribed by Section 10832, under which plaintiff in error then came forward and asked new rights, had expired, that the motion to amend and add a new defense was made, and if there had been any force to the new defense offered, defendant in error could not overcome it, where, had it been timely set up, defendant in error could have brought itself within the statute, had it so desired. Defendant in error's claim accrued in July, 1903 (R., 3, 4). Under Section 10832, defendant in error had until July, 1904, to file its claim in the county of its residence. If defendant in error had had any notice that plaintiff in error in-

tended to raise the new defense, that defense offered could, up to July, 1904, have been easily brushed aside, if it, in fact, existed. On August 15th, just after the year had expired, and when, if the defense proposed really had any force or merit, it would be too late to overcome it, it was brought forward by plaintiff in error. It is plain that if there were no other reasons for not considering the new defense, the fact that, if it has any force, it would tend to thwart, rather than further, justice, would be sufficient reason for not considering it.

The new defense which was brought forward as against the original complaint is urged under Section 10832, Compiled Laws of 1897, which reads:

> "Liens may be enforced under this Act at any time within six years from their origin: Provided that no lien shall be enforced against a watercraft in the hands of a bona fide purchaser, without notice, unless a complaint to enforce the same shall have been filed in the proper court in the county where the party claiming the lien resides, within one year from the time when the same accrued."

The Supreme Court of the State of Michigan was plainly right in denying the petition of plaintiff in error for leave to amend and add the new defense. But if the defense had been timely set up, it would not avail, because:

The Iroquois Transportation Company was not a bona fide purchaser;

The intent of the act was to give the benefit of it to non-residents as well as residents;

The purpose of the section was to have timely notice given and to have the claims timely enforced.

The whole intent of the statute, as is shown by Section 10831, is to provide for the enforcement of the

claims of non-residents as well as those of residents. Section 10831 provides:

> "In cases where, by the general maritime law or laws of any other of the United States, now or hereafter to be passed, liens similar to those provided for in this Act shall be created against water-craft, the same may be enforced under the proceedings established by this Act, in like manner as if they accrued in this State," etc.

In this case, even assuming that the Iroquois Transportation Company is a bona fide purchaser, timely notice was given, and the enforcement of the claim timely proceeded with, because notice was given, in fact, on August 25th, 1903, about a month after the completion of the *Winnebago,* and suit was instituted by the filing of complaint on October 6th, 1903.

The purpose of the limitation was to fix the time limit when a purchaser could buy and be protected against outstanding claims.

A party purchasing before that period had expired would not be a bona fide purchaser.

In other words, the Iroquois Transportation Company, when it made the last payment on its contract for the steamer, must be held to have made the payment with knowledge of the existing law, and with knowledge of the fact that under Section 10832 any parties furnishing materials, labor, etc., in connection with the construction of the ship, would be entitled to enforce their liens as against the Iroquois Transportation Company. The Iroquois Transportation Company had made, in July, 1903, its final payment on the contract for building, and with knowledge of the fact that under Section 10832 all material men could come in and claim liens against the ship.

It is in evidence that this final payment was made, and no security taken to protect the company against the outstanding liens.

The proofs are strangely silent as to what was said by the officers of the Iroquois Transportation Company and the Columbia Iron Works with reference to outstanding liens.

The proofs are likewise silent on the question of whether or not the Iroquois Transportation Company made any inquiry regarding such claims, and no direct statement appears in the record intimating that the Iroquois Transportation Company did not know every outstanding claim against the ship when the final payment was made.

There is not a suggestion in the record that the officers of the Iroquois Transportation Company, who were present at the yards of the Columbia Iron Works for several days before the ship was turned over to them, could not have had full access to the Columbia Iron Works's books, or that they could not have known if, as a matter of fact, they did not actually know, just what claims were outstanding.

The mere unsupplemented fact that the officers of the Iroquois Transportation Company, some ten days before the failure of the Columbia Iron Works, visited the plant of the Columbia Iron Works and stayed there for several days, and until they arranged for the turning over of the *Winnebago* to them in an uncompleted condition, points strongly to some indication of knowledge of the financial affairs of the Columbia Iron Works on the part of the officers of the Iroquois Transportation Company.

When this fact is supplemented by the further fact that the officials of the Iroquois Transportation Company do not offer a word of proof as to what knowledge they had of outstanding liens when the ship was turned over to them, it is clear that the Iroquois Transportation Company is not before the court as a bona fide purchaser for value without notice.

"A bona fide purchaser is one who takes the property for value, in good faith, and without notice of the adverse interest sought to be enforced against him. All these elements must be present."

24 *Am. & Eng. Encly. of Law, 2nd Ed., page* 1169.

Barnard vs. Campbell, 58 *N. Y.,* 73; 17 *Am. Rep,.* 208.

It is also the rule that the taking of personal property in payment of pre-existing indebtedness does not, as a general rule, make the purchaser a bona fide purchaser, as he is not considered to have parted with value, and if the purchaser is deprived of the property, he is in no worse condition than before his purchase.

McGraw vs. Solomon, 83 *Mich.,* 442.

To constitute one a bona fide purchaser, he must have made his purchase without notice of the adverse interest sought to be enforced against him.

Read vs. Horner, 90 *Mich.,* 152.

24 *Am. & Eng. Encly. of Law, 2nd Ed., page* 1174.

Notice is to be distinguished from knowledge, and if the buyer has notice of facts which would put a reasonably prudent man upon inquiry which would have resulted in the ascertainment of the adverse interest sought to be enforced against him, he will be deemed to have taken with notice, and cannot assert the rights of a bona fide purchaser.

Read vs. Gannon, 50 *N. Y.,* 345;

Allen vs. McCalla, 25 *Iowa,* 464; 96 *Am. Dec.,* 56.

In *Hough vs. Dickinson,* 58 Mich., 89, at page 94, the Court says:

"It is generally established that knowledge of facts sufficient to put an ordinarily prudent man on inquiry is all that is required," etc.

See also

Bedford vs. Penny, 58 *Mich.,* 424-428.

TO SUMMARIZE:

When the Iroquois Transportation Company first parted with payments on the contract, it had or was chargeable with notice of building liens ahead.

It continued to make payments, chargeable with such knowledge of building liens ahead.

It made its final payment, chargeable with knowledge of outstanding liens.

There is not a syllable of proof in the record that it did not have actual and full knowledge of the amount of every outstanding lien. It certainly had the facility of obtaining this information, as its officers were present at the yards of the Columbia Iron Works several days before the ship was turned over to their company in an uncompleted condition.

The Iroquois Transportation Company was, therefore, chargeable with the knowledge of the existence of these claims.

The substance of the statute has been complied with, because the Iroquois Transportation Company was given notice within a month, and the complaints were filed about two months after the ship was turned over to them.

The defense, under Section 10832, was not raised in the pleadings, and had it been raised, then there would have been the greater part of a year to have complied with the statute, if, in fact, complainant had not already complied. The point was not raised by plaintiff in error until after the year had expired. The equities are not with plaintiff in error. The defense not having been raised in the pleadings or brought up until after the appeal had been perfected, no proofs were taken to show

whether or not complainant had failed to comply literally with the statute, and plaintiff in error, while claiming to be a bona fide purchaser, did not raise any defense that called upon respondent to put in proofs on the question of complying with Section 10832.

It is submitted, however, that it was not intended that this complaint be filed in the county where the party claiming the lien resides in all cases. The DeLaney Forge & Iron Company, the complainant here, was a resident of Buffalo, and it could not have obtained service by filing its complaint there. The purpose of the Act, as stated, was to bring timely notice to a purchaser, and to provide for the timely enforcement of the claim, which was done, and to file a claim at Buffalo would have given no notice to defendant; it would have served no purpose.

The equities are strongly with the defendant in error. The Iroquois Transportation Company paid its contract price chargeable with full knowledge of the existing liens, and there is not a syllable of proof in the record that the Iroquois Transportation Company did not have actual knowledge of every outstanding lien, and it certainly had the facilities for getting such information, through its close association with the Columbia Iron Works.

The Circuit Judge found that the equities were strongly in favor of the complainant. He says (R., p. 101):

> "The Iroquois Transportation Company contracted with the Columbia Iron Works, and took this vessel before it was fully completed, but even though they had awaited until its entire completion, under the statute they took it subject to whatever claims were against it. The facts here are, though, that they took it hurriedly, before it was finally completed. I will not review the cases cited, touching a buyer in good faith in a case of this nature, and will say that the equities point strongly to a lien on the ship."

The Supreme Court of the State of Michigan evidently considered the proposition concluded when they denied the leave to amend to set up the new defense, as, although the matter was fully argued in the briefs before that court, they make no express reference to the point as affecting in any way the general case.

UNDER POINT III.

Under this head, the brief for plaintiff in error discusses one subdivision or phase of the federal question that is before this court.

Under this subdivision the brief discusses a number of well-settled cases dealing entirely with maritime contracts, and it is argued, from separate parts of these several decisions, that the proceeding here trenches upon the exclusive jurisdiction of the federal courts.

The case of The Glide, 167 U. S., 606, quoted from at page 17 of brief for plaintiff in error, is a case that was brought under the Massachusetts statute, and was for labor performed and materials furnished in *repairing the Glide;* as the court will note, a case involving a distinctly *maritime* contract as distinguished from a *non-maritime* contract. At page 620 of this authority quoted by counsel for plaintiff in error, Mr. Justice Gray recognizes the jurisdiction of the State courts in non-maritime matters, where he says:

> "At the same term, a process *in rem* to enforce a lien given by a statute of New Jersey for building a ship was held to be within the jurisdiction of the courts of the State, solely because, as previously adjudged by this court, a contract for building a ship was not a maritime contract, but a contract made on land and to be performed on land, and therefore not a subject of admiralty jurisdiction. Edwards vs. Elliott, 21 Wall., 532, 553, 556; The Jefferson, 20 How., 393; The Capitol, 22 How., 129.

"Likewise in Johnson vs. Chicago & Pacific Elevator Co., decided at October term, 1886, the remedy given by the statute of Illinois was *in personam*, and the cause of action was not a maritime tort, but an injury done by a steam tug to a building on land, of which an admiralty court of the United States would have no jurisdiction; and, as was said by Mr. Justice Blatchford in delivering judgment:

"'This being so, no reason exists why the remedy for the wrong should not be pursued in the State court, according to the statutory method prescribed by the law of the State, even though that law gives a lien on the vessel. The cases in which State statutes have been held void by this court, to the extent in which they authorized suits in rem against vessels, because they gave to the State courts admiralty jurisdiction, were *only cases* where the causes of action were cognizable in the admiralty.'"

The case of The Roanoke, 189 U. S., 185, relied on by counsel for plaintiff in error, is a case brought under the Washington statute, and the proceeding was in rem for materials, work and labor furnished in *repairing* the steamship *Roanoke;* the case involving a distinctly *maritime* contract, as distinguished from the *non-maritime* contract in the case at bar. The court there finds the Washington statute unconstitutional, dealing, as it does, with this maritime matter, in so far as the statute attempted to control the administraion of the admiralty law by creating and superadding conditions, etc. *The Roanoke*, it is submitted, is no authority for holding any similar statute unconstitutional, except insofar as those statutes attempt to control maritime matters.

While we do not regard it as material, as a matter of fact, the proceeding here against the *Winnebago* is the same in substance as the proceeding taken under the statute in Johnson vs. Chicago & Pacific Elevator Co., supra. A warrant was issued in the case at bar against the owner's representative in charge of the ship, as well as a writ against the ship itself, substantially the same

as in the case quoted from. No actual seizure was made, but service was accepted and bond given.

Another of the authorities referred to by counsel for plaintiff in error is the case of Perry vs. Haynes, reported under the name of The Robert W. Parsons, 191 U. S., 17.

The principal question in that case was as to whether or not the Parsons, being a small canal-boat without steam or other power, was a subject of admiralty jurisdiction. The court reviewed the question fully, and concluded that the craft was a subject of admiralty jurisdiction. The proceeding was brought under the New York statute, asking recovery under a contract for *repairs* to the canal boat. When the court had once determined the question of the character of the boat, it will be seen at once that the contract under which recovery was claimed was a *maritime* contract, and that, therefore, the proceeding which was attempted to be brought against the craft under the New York statute on the theory that she was not a thing of admiralty cognizance, was held not proper. The New York statute, insofar as it attempted to enforce a lien against a ship in connection with a maritime contract, was held to be unconstitutional.

The quotation made from *The Robert W. Parsons* in counsel's brief, at page 21, where the court states that the statute "partakes of all the essential features of an admiralty proceeding in rem, of which exclusive jurisdiction, etc., is given to the District Courts," was clearly referring to the exclusive jurisdiction in admiralty and maritime matters, because the court said, in an earlier part of its opinion, what it has recognized so frequently in all its pronouncements, at page 25, as follows:

> "It is equally well established that for causes of action not cognizable in admiralty, either in rem or in personam, the States may not only grant

liens, but may provide remedies for their enforcement. Contracts for the building of a ship are the most prominent examples of such as are not maritime in their character, and hence within this rule," citing,

The Jefferson, 20 *How.*, 393;
The Capitol, 22 *How.*, 129;
Edwards vs. Elliott, 21 *Wall.*, 532;
Johnson vs. Chicago & Pacific Elevator Co., 119 *U. S.*, 388;
Shepard vs. Steele, 43 *N. Y.*, 52.

Another contention urged in the brief for plaintiff in error, under this subdivision, is the contention that the Act here proceeded under is surely in some respects unconstitutional. In the several particulars referred to at pages 18, 19 and 20 of said brief, if it be conceded that these provisions are in conflict with the Constitution and laws of the United States, still, in what manner does that aid plaintiff in error, or affect the case at bar?

The contention of defendant in error is that, even if the Statute is unconstitutional in some respects, it is constitutional and valid, insofar as it relates to the claims in controversy here, and the part being dealt with in this controversy is not so related in substance, and the provisions are not so interdependent that one cannot operate without the other. Under such circumstances, the part that is constitutional will, under all the authorities, stand.

6 *Am. & Eng. Encyl. of Law*, 2*nd Ed.*, *p.* 1088, *and cases;*
Keokuk Co. vs. Keokuk, 95 *U. S.*, 80;
Unity vs. Burrage, 103 *U. S.*, 447-459.

It may be true that the effect of the statute, even where it attempts to enforce a lien on a non-maritime contract, would be to shut off maritime liens if the vessel went to sale. But the issues here are not burdened with that

question. It cannot, in this case, have the effect of cutting off any maritime liens. The vessel has been bonded, and her owner has appeared in the action. Then, again, the fact that the act, in case of a sale, assumes to distribute the proceeds and marshal the claims in an order not accepted in the admiralty court, does not affect the case at bar, even though it may be unconstitutional in that regard.

As was said by Circuit Judge Severns, in *The Winnebago,* 141 Fed., 945, at page 950; 73 C. C. A., 295, at page 300:

> "It is further suggested that she might become subject to maritime liens which could only be enforced in the admiralty, which may also be conceded. We are unable to perceive that any relevant consequence ensues upon the fact that the vessel had engaged in interstate commerce, and the fact that she might become subject to maritime liens would not destroy liens already lawfully acquired. It is true she might become subject to maritime liens which would be superior to the existing lien, and that such liens would have to be enforced in the admiralty. But that possibility does not defeat the enforcement by a State court of the non-maritime lien to which she is subject. How else is the owner of the latter to obtain his remedy? It may be the vessel will never become subject to maritime liens at all; and, if so, the holder of the existing lien may never have even the privilege of proving his claim in some cause instituted for another purpose. But no such supposed embarrassment has yet occurred. And they are as yet imaginary. But suppose such other liens should attach? That should not prevent the enforcement of the earlier lien in the proper court. If the holder of the earlier lien delays his action, he subjects himself to the danger of superior liens becoming fastened, and the enforcement of his own lien in the State court must leave the vessel subject to the superior liens of which the State court cannot take cognizance. If occasion requires, and the admiralty court enforces the superior liens, it is in no wise obstructed by the action of the State court, and the title under a decree of the former court would defeat the title

gained under the decree of the State Court. The case of Moran vs. Sturgis, 154 U. S., 256, 14 Sup. Ct. 1019, 38 L. Ed., 981, is a good illustration of this subject. There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other should require it; but that is an incident common along all the lines of concurrent proceedings in the state and federal courts, and gives no ground for the denial of jurisdiction to either."

UNDER POINT IV.

Discussion of the matters referred to in brief for plaintiff in error under Point IV. would seem to be profitless. If the point stated were accepted as true, it would avail nothing to plaintiff in error.

The Supreme Court of the State of Michigan (R., 144-145) said:

> "It cannot with accuracy be said that materials furnished as in this case, where a statute of a State gives a non-maritime lien, are furnished upon the credit of the vessel. Such language is only exact where reference is had to a maritime lien.
>
> "The statutory lien attaches by operation of law, where the materials furnished are within the provisions of the statute. The lien attaches as an incident to the contract, and unless such lien is waived, the provisions of the statute may be invoked for its enforcement."

This finding of the Supreme Court of the State of Michigan will not be disturbed by this court.

Ashley vs. Ryan, 153 *U. S.*, 456.

The elaborate discussion, therefore, on the subject of what other States hold regarding peculiar lien statutes of their own, is scarcely material here.

Insofar as the statements of fact in brief for plaintiff in error under Point IV. are concerned, it is only relev-

ant, perhaps, to note that the Supreme Court of the State (R., 144-145) found the facts, as well as the law, in favor of defendant in error.

This court will not review the decision of the State court upon these matters of fact.

Dower vs. Richards, 161 *U. S.,* 458.
Egan vs. Hart, 165 *U. S.,* 188.
Bement vs. National Harrow Co., 186 *U. S.,* 70-83.

The United States Circuit Court of Appeals for the Sixth Circuit, in The Winnebago, 141 U. S., 945, at page 950, 73 C. C. A., 295, at p. 300, construes the State statute in the same way that the Michigan Supreme Court construes it, and says:

> "The statute declares a lien in favor of the party furnishing material for the building of the ship. But it does not contemplate that credit shall not be given to the owner, or that he shall not be liable personally for the debt. It is possible, no doubt, for the furnisher to waive the lien; but, unless he does so, the lien exists. The burden of showing the waiver rests upon the party who alleges it."

UNDER POINT V.

In the brief for plaintiff in error, page 36, the fact is shown that in the schedule attached to the DeLaney Forge & Iron Company's bill of complaint (R., pp. 3 and 4) four items, aggregating $184.72, were furnished after the ship was launched. *The Winnebago* was launched March 21st, 1903.

The claim is made that for these materials which were furnished subsequent to the launching of the *Winnebago*, no remedy exists here, for the reason, as is stated in the said brief for plaintiff in error (p. 37), that the lien could be enforced in admiralty.

The claim of defendant in error on this point is, that so long as the materials were to be used as part of the original construction of the ship, the admiralty would not take cognizance of them.

In *The Iosco,* Bro. Adm., 495, Fed. Cas. 7,060, a hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped, and the vessel put in condition for navigation. *Held*: that the work was done in building the vessel, and that admiralty had no jurisdiction.

In that case, decided in the United States District Court for the Eastern District of Michigan, Judge Longyear said:

> "Whether the claim of libelants arises out of a maritime contract, and whether they have a right of action in this court in rem, depends upon the question of fact whether what libelants did and furnished were to and for a vessel already in existence, or whether they were so done and furnished in part to bring her into existence as a complete thing. If the former, then the action will lie. If the latter, it will not lie, and this court has no jurisdiction. It was so settled fully and definitely by the Supreme Court in December term, 1857, in the case of People's Ferry Company vs. Beers, 20 Howard (61 U. S.), 393, and reaffirmed in December, 1859, in the case of Roach vs. Chapman, 22 Howard (63 U. S.), 129. In the mind of the court, there is no room for doubt or discussion as to the question of fact. What libelants did and furnished were clearly by way of completing the construction of the vessel, and constituted in no sense within the meaning of the maritime law, repairs and materials for which by that law an action in rem will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water."

The above case, recognized in the District where the case at bar is pending as the law, has been quoted from

with approval by other courts. The points came up directly in The Victorian, 24 Oregon, 121, at pages 132-3-4-5, where the court said:

> "It is true that contracts relating to commerce and navigation are classed as maritime contracts; but the simple fact that an incomplete or unfinished vessel has been launched into the water when a contract relating to her completion is made, in no way fixes or determines its character. In such case the work performed or the material furnished is in constructing the boat or vessel, and to bring her into existence as a complete entity. There is a marked difference between furnishing materials to a vessel already in existence and furnishing them to bring one into existence. The latter are for her construction, and the contract is not maritime. The idea is that the vessel, when completed, will be used for maritime purposes, but until then she is in the process of construction—a structure under State control—and a claim for materials furnished, though she may be afloat, is not a maritime, but a land, contract. The fact, therefore, that the work was done, or the material furnished, after the vessel was launched, does not per se, as the cases show, render the contract maritime. In Wilson vs. Lawrence, 82 N. Y., 411, the vessel was launched before it was completed, and thereafter the plaintiff contracted to furnish her with sails, as a part of and to complete the work of construction. The question was whether the furnishing of sails after launching was a land contract, or one purely maritime. The court held that it was a land contract, and that the lien attached. Finch, J., said: 'It is doubtless true that, before launching, the contracts for construction are more easily and strongly shown to be land contracts, but no case holds that the work of building or constructing a vessel cannot proceed after the launch. Indeed, no case could hold that, for it is purely a question of fact. A vessel may be unfinished when launched, and the work of building may be unfinished when she is in the water.' * * * In Roach vs. Chapman, 22 How., 129, the court held that 'a contract for building a ship, or supplying engines, timber, or other material for her construction, is clearly not a maritime contract.' If an engine is an essential part of the construction

of a vessel propelled by steam, why are not the sails an essential part of the construction of a sailing vessel? Is the ship without these necessary aids any more built or constructed in the one case than the other? * * * We are satisfied that the contract in this case was a land contract, and that the lien attached.' In McDonald vs. The Nimbus, 137 Mass., 360, Field, J., said: 'The facts show that the materials furnished in this case were furnished in the construction of the vessel. She was not so far constructed as to be fitted for sea, and used as a commercial vessel, after her arrival in Gloucester.' Baizley vs. The Odorilla, 121 Pa. St., 233 (1 L. R. A., 505; 15 Atl. Rep., 521).

(Then follows a reference to the Iosco and a quotation in which Judge Longyear's language is quoted with approval.)

"In The Count De Lesseps, 17 Fed. Rep., 461, the claim was for materials, consisting of a derrick, buckets and other dredging machinery furnished at Philadelphia after the vessel had been towed from New Jersey, where she had been built, to fit out the vessel for an intended voyage to Panama, and it was held that they were furnished in the original construction of the boat; The Pacific, 9 Fed. Rep., 124; Gollins vs. Coernine, 7 Am. Law Reg., 5; Smith vs. The Royal George, 1 Woods, 293; The Norway, 3 Ben., 163. These cases show that a claim for work done, or materials furnished, in the building or original construction of a vessel is not a maritime contract, and that admiralty has no jurisdiction. The claims are not maritime when they are for original construction or equipment, whether or not the boat has been launched. It is the usual mode in the building of steamers, to build the hull, and to place the engines, boilers and machinery in it after the launching, so as to avoid the additional weight of the machinery in the process of launching. When the work done, or the material furnished, is used in the construction of the vessel, and to bring her into existence as an entity, the claim does not arise out of a maritime contract, and it is competent for the State courts to enforce it by a proceeding in rem."

The dicta in Globe Iron Works vs. Ketchum, 100 Mich., 583, to the effect that after a vessel is launched contracts for equipment or materials or repairs are maritime, it will be noted, refers to *contracts made* after launching, and proceeds on the mistaken theory that the admiralty courts will take cognizance of all contracts made after launching as maritime contracts. * * * It is no authority for the suggestion, which appears in brief for plaintiff in error, that there can be no lien for materials put aboard after the ship was launched, if they were contracted for before the launching.

In the case of Edwards, et al., the proof is (R., 110) that the windlass, capstan and reversing engines were furnished on February 11, 1903, more than a month before the launching. If the dicta in the *Ketchum* case on the question of what are maritime contracts were good law, this would not affect the item of windlass, capstan, etc., for the reason that the contracts for the equipment were made a month before the launching. It is the law, however, that, for all materials furnished as part of the original construction there is a lien enforceable here, whether the contracts for same were made after the launching or before.

In the case of The Winnebago, 141 Fed. Rep., 945, at page 951, 73 C. C. A., 295, at p. 301, Circuit Judge Severens says:

> "A ship launched but still in the course of construction does not become subject to the maritime law because she rests in the water rather than on land, and does not become so until she is put into use as an agency of commerce; or, at least, until she is fitted for that purpose, and she ceases to possess a maritime character when she is permanently withdrawn from such service."

Citing:

> *City of Detroit vs. Grummond,* 121 *Fed.,* 963, 971; 58 *C. C. A.,* 301.

UNDER POINT "VI."

Under this head of the brief for plaintiff in error, the proposition is contended for that the Steamer *Winnebago,* engaged in interstate commerce, was not subject to seizure while passing from port to port through the waters within the jurisdiction of the Courts of the State of Michigan.

Two facts should be borne in mind in this connection:

(A) It is not correct to say that the *Winnebago* was seized in this proceeding. Instead, the fact is that a bond was given without seizure.

(B) It does not appear in the record that the *Winnebago* was, at the time the complaint was filed or service accepted, engaged in interstate commerce. On some of her voyages it does appear that she loaded or unloaded cargo at ports in the State of Michigan.

Even if there had been seizure in this case, and if it were shown that the *Winnebago* was engaged in interstate commerce at the time appearance was asked or service accepted, it is submitted that the whole trend of judicial authority, as evidenced by the references above made, is to the effect that the State here had complete power to make and enforce the law here made and enforced, insofar as it relates to the *non-maritime* matter here under discussion, and that its enforcement is not a regulation of commerce.

In the case of Smith vs. The State of Maryland, 18 How., page 71, at page 74, the Court says:

> "It was argued that it is repugnant to that clause of the constitution which confers on Congress power to regulate commerce, because it authorizes the seizure, detention and forfeiture of a vessel enrolled and licensed for the coasting trade, under the laws of the United States, while engaged in that trade.

> "But such enrollment and license confer no immunity from the operation of valid laws of a State. If a vessel of the United States, engaged in commerce between two States, be interrupted therein by a law of a State, the question arises *whether the State had power to make the law by force of which the voyage was interrupted.* This question must be decided, in each case, upon its own facts. If it be found, as in Gibbon vs. Ogden, 9 Wheat., 1, that the State had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful, and the proceedings under the law invalid. But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws."

In the case of Johnson vs. Chicago & Pacific Elevator Company, 119 U. S., 388, at page 398, the Court says:

> "In Taylor vs. Carryl, 20 How., 583, this Court upheld the validity of the seizure of a vessel under a process of foreign attachment issuing from a State Court of Pennsylvania, in pursuance of a statute of that State, as against a subsequent attempt to seize her under process in admiralty. In the course of the opinion of the Court, delivered by Mr. Justice Campbell, it is said:
>
> " 'The process of foreign attachment has been for a long time in use in Pennsylvania, and its operation is well defined by statute as well as judicial precedents. The habit of courts of common law has been to deal with ships as personal property, subject, in the main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution; and the titles to them, or contracts and torts relating to them, are cognizable in those courts.' "

And again, on page 399, the Court said:

> "There being no lien on the tug by the maritime law for the injury on land, inflicted in this case, the State could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under State statutes

> enforceable by attachment in suits in personam are of every-day occurrence, and may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings in rem, or otherwise conflict with the Constitution of the United States. * * * This disposes of the objection that the vessel, being engaged in commerce among the States and enrolled and licensed therefor, no lien on her could be enforced by attachment in the State court. The proceeding to enforce the lien in this case was not such a regulation of commerce among the States as to be invalid, because an interference with the exclusive authority of Congress to regulate such commerce, any more than regulations by a State of the rates of wharfage for vessels, and of remedies to recover wharfage, not amounting to a duty of tonnage, are such an interference, because the vessels are engaged in interstate commerce," citing,
>
> *Cannon vs. New Orleans,* 20 *Wall.,* 577, 582;
> *Packett Co. vs. Catlettsburg,* 105 *U. S.,* 559;
> *Trans. Co. vs. Parkersburg,* 107 *U. S.,* 691.

The cases cited at page 40 of brief for plaintiff in error deal with railway transportation. Service was in the case at bar accepted and bond given without seizure, and without prejudice, but nothing appears to show that at the time the vessel was bonded she was not bound for some point within this State. The cases referred to have no bearing on the controversy here. As is said in Connery vs. Quincy, etc., Railway Company, 99 Northwestern, 365; 64 L. R. A., 624, at page 626:

> "The Federal government has expressly required that the movement of railway cars shall not be stopped or delayed at the point where the lines of such railway companies cross the borders of states, or at the point where the carriers deliver the cars to the next connecting carriers; but that shipments will go forward from the originating point to their destination in the cars in which they are first loaded. U. S. Rev. Stat., 5258 (U. S. Comp. St., 1901, p. 3564)."

The Supreme Court of the State of Michigan in passing on this point in the case at bar, say (Record 145):

> "The question to be determined in each case is whether the State had the power to make the law under which the proceeding is instituted. If such power existed, vessels of the United States may be subjected to process issued from State Courts to enforce a valid lien in proceedings under such law. In this respect the law of the State is valid, and the proceedings taken under it regular."

This doctrine accords with the pronouncements of this Court, as shown in the case of Smith vs. The State of Maryland, 18 How., 71, at page 74.

In the Circuit Court of Appeals for the Sixth Circuit, deciding the case of the *Winnebago,* 141 Fed., 945, at page 950, and 73 C. C. A., 295, at page 300 (which case it will be remembered arose at the same time with the case at bar, and against the same boat, and has the same plaintiff in error, and is in all respects practically identical with the case at bar), the Court says:

> "We are unable to perceive that any relevant consequence ensues upon the fact that the vessel had engaged in interstate commerce."

In the *Winnebago* case just referred to, after conclusion in the Circuit Court of Appeals, petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit was filed and the writ denied by this Court. This case is No. 512 in the October, 1905, term, entitled: The Iroquois Transportation Company, Etc., Petitioner, vs. A. Harvey's Sons Manufacturing Company, decided December 18, 1905. The memorandum covering same decision is noted in 200 U. S., 616.

In the case of Knapp, Etc., Co. vs. McCaffrey, 177 U. S., page 638, Mr. Justice Brown reviews from the Constitution down the question of admiralty jurisdiction, the exclusive character of it, etc., etc., in the District Courts, and after commenting upon The Moses Taylor, 4 Wall., 411; The Hine vs. Trevor, 4 Wall., 555; The Belfast, 7 Wall., 624; The Lottawanna, 21 Wall., 558;

The J. E. Rumbell, 148 U. S., 11; The Glide, 167 U. S., 606, and Moran vs. Sturges, 154 U. S. 256, and at page 642 says:

> "The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That wherever any lien is given by a State statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts.
>
> "But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the State. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction (The *Jefferson*, People's Ferry Co. vs. Beers, 20 Howard, 393; The *Capitol*, Roach vs. Chapman, 22 How., 129) we held in Edwards vs. Elliott, 21 Wall., 532, that in respect to such contracts it was competent for the States to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement in rem."

UNDER POINT VII.

(Mistakenly referred to as VI. at p. 41, in brief for plaintiff in error.)

Point VII. of brief filed for plaintiff in error contends for the proposition that the contract to build a ship is a maritime contract, and therefore there is a lien for material and labor furnished which can be enforced in a court of admiralty, there being a lien under the State law.

The last fifty pages of brief for plaintiff in error treats on the above question. The question discussed under that point really forms the basis of the entire defense.

The discussion of this point in brief for plaintiff in error treats exhaustively of the subject in an historical way, and details at considerable length what the law of the maritime codes of the various foreign countries are.

The law in this country on this subject is so thoroughly well settled and has been acquiesced in and accepted as having a sound basis for so many years that it would seem to be unnecessarily consuming the time of this Court to again detail the sound reasons for allowing the well established rule of this Court to stand. The reasons stated in Edwards vs. Elliott, 21 Wallace, 532-553, show clearly the soundness of the doctrine of this Court.

It is readily seen that the line must be drawn somewhere, between contracts regarded as maritime and those not to be so regarded, and where conceivably could it be drawn in a more reasonable place than it is at present under the rule which refuses to treat as maritime contracts those which do not concern a finished instrument of commerce, or which do not pertain to navigation.

There is not and cannot be the same necessity for so-called uniformity in building contracts that there may be for national or international features of shipping, as, for instance, rules respecting the navigation of vessels, and relating to collisions, average, questions between ship owner and shippers, and other questions that may become important at any time at home or abroad with any ship or merchant. In those matters there is in reason a necessity for as much uniformity as can be reasonably brought about, but in relation to the building of a vessel these conditions do not exist. The work is done on land, the work is local, and contracts relating to her are necessarily local, and all details in connection with the contract for building are matters regarding which the parties have the local law in mind when they contract.

The proposition has very recently been before this Court, to-wit: No. 339, on the docket of the present Octo-

ber term, 1906. The point was very exhaustively discussed in that case by counsel for the plaintiff in error here. The case is entitled The Graham & Morton Transportation Company, Appellant, vs. The Craig Ship Building Company, Appellee, and was an appeal from the District Court of the United States for the Northern District of Illinois. This Court affirmed without opinion the decree of the District Court of the United States for the Northern District of Illinois, which dismissed the libel filed therein on the ground that the cause of action therein, which grew out of a contract for building a ship, did not arise out of a maritime contract.

In conclusion it is submitted that the decree of the Supreme Court of the State of Michigan should be affirmed, with interest and costs.

Respectfully submitted,

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